

# LIBERTY COUNSEL



## DISTRICT OF COLUMBIA

109 Second Street NE  
Washington, DC 20002  
Tel 202-289-1776  
Fax 407-875-0770  
LC.org

## FLORIDA

PO Box 540774  
Orlando, FL 32854  
Tel 407-875-1776  
Fax 407-875-0770

## VIRGINIA

PO Box 11108  
Lynchburg, VA 24506  
Tel 407-875-1776  
Fax 407-875-0770  
Liberty@LC.org

## REPLY TO FLORIDA

December 3, 2021

### By ECF Only

The Honorable Ann M. Donnelly  
United States District Court  
Eastern District of New York  
225 Cadman Plaza East  
Brooklyn, NY 11201

**Re: *Does v. Hochul*, No. 1:21-cv-05067-AMD-TAM  
Status Report Regarding Amendment of Complaint**

Dear Judge Donnelly:

Pursuant to the Court's Minute Entry and Order of November 3, 2021, the parties provide the Court with the following status report:

### Plaintiffs' Status Report:

As contemplated by the Court's Order, the Second Circuit has issued its opinion in *We the Patriots USA, Inc. v. Hochul*, 17 F.4th 266 (2d Cir. 2021) (consolidating for decision *We the Patriots USA, Inc. v. Hochul*, No. 21-2179, and *Dr. A. v. Hochul*, No. 21-2566), clarified by 17 F.4th 368 (2d Cir. 2021). The plaintiffs in both underlying appeals, however, have applied to the Supreme Court for emergency writs of injunction pending resolution of their forthcoming petitions for writs of certiorari. (See S. Ct. Nos. 21A125, 21A145.) The Supreme Court has requested and received responses to the applications but has not yet decided them. Thus, the Second Circuit's opinion is likely not the last word on important, substantive legal issues directly bearing on the parties' respective positions and approaches to pleadings in this case. Under these circumstances, Plaintiffs believe that the decision of whether to file an amended complaint is premature.

Furthermore, Rule 15(a)(1)(B) allows Plaintiffs to defer any decision on amendment until 21 days after Defendants file a motion to dismiss under Rule 12(b) (or an answer under Rule 12(a)). Given that any decision by the Supreme Court on the pending *We the Patriots* or *Dr. A.* applications will necessarily not be on the merits, and given that Plaintiffs here have no control over whether the respective plaintiffs in those cases will continue to press their claims on the merits at all trial and appellate levels, Plaintiffs here will not likely abandon any claims by amendment even if the Supreme Court indicates the possibility of an adverse merits ruling in the future.

Accordingly, Plaintiffs intend to wait until after the Supreme Court decides the pending *We the Patriots* and *Dr. A.* applications, and after Defendants file their respective motions to dismiss or answers, to determine whether to avail themselves of the right to amend as a matter of course under Rule 15(a)(1)(B). Plaintiffs respectfully request that the Court defer issuance of any order scheduling pleading or motion to dismiss briefing deadlines until after the Supreme Court decides the pending *We the Patriots* and *Dr. A.* applications.

**Defendants' Status Report:**

Given plaintiffs' position that they do not wish to amend their complaint at the present time, notwithstanding the facial infirmities in their claims—as pointed out in defendants' respective letters dated October 4 and October 5, 2021, at the November 3, 2021 Status Conference, and by the Second Circuit's opinions in *We the Patriots* and *Dr. A.*—defendants respectfully advise the Court that it is their intention to move to dismiss. Defendants have no objection to plaintiffs' request that the Court defer briefing on the motions to dismiss until after the Supreme Court decides the pending applications for emergency writs of injunction in *We the Patriots* and *Dr. A.*, but respectfully request that the Court enter the following briefing schedule:

- Within forty-five (45) days of any decision by the Supreme Court on the pending *We the Patriots* and *Dr. A.* injunction applications, defendants will file their respective motions to dismiss. Plaintiffs will have thirty (30) days to oppose, and defendants will have fifteen (15) days to reply.

Respectfully submitted,



Roger K. Gannam  
*Counsel for Plaintiffs*

c: Counsel of Record (by ECF)